AN ORPHAN'S STORY: WHAT WE DO AT USC LAW

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I. CONCEPTUAL ISSUES IN A CENTENNIAL (OR ANY ANNIVERSARY) CELEBRATION[1]

This issue of the *Southern California Law Review* was called forth because the Law School's centennial is upon us. I do not know the exact date of this centennial. In fact, there probably is no exact date because the date of origin is contested on conceptual grounds. This is certainly a more interesting difficulty than simply not knowing the date of a discrete event whose nature and occurrence no one doubts. Are we to count from the time when one or more persons decided to start the Law School? When a written contract was signed? When the first building was rented? Or the first announcement made, or the first student accepted, or the first class started? Or is it when we joined the University and ceased to be a freestanding entity? Can an institution (or anything) have several birth dates? What are we to make of the shift from the appellation "Los Angeles Law School" to an appellation containing "University of Southern California"? Is the name change more than a matter of mere labeling, or does it suggest that more than one institution is involved? Perhaps there is simply no unique fact of the matter to verify.

Predictably, a pragmatic and practical compromise was reached when the Law School addressed anniversary theory and found it wanting. We

* Dorothy W. Nelson Professor of Law, University of Southern California Law School. I made this. No one else can take credit or blame for it. Some people read it over, but they insisted on not being identified.

1. "Celebrate" used to be a good word until it was preempted by various academic factions in law and other fields. Same with "robust" and a bunch of other words taken over by persons with limited vocabularies and by ideologues generally. I therefore will not use these terms except to make fun of others.

decided that since there was no obvious way to resolve the issue when framed in an all-or-nothing manner, we should select a set of crucial beginning or starting events, each of which had some claim to be a beginning of an important continuing institution, but none of which seem definitively to be the unique genesis date. So, over the past two years, we have been celebrating these fountainhead happenings at various times and in various ways.[2]

My interest in this centennial begins and ends with this vapid conceptual issue; perhaps we have simply found another cluster concept.

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2. These occurrences are recorded in 1 LAW SCHOOL BULLETINS (1897–1914) (on file with the University of Southern California Law Library) (unpaginated) [hereinafter BULLETINS]. The Los Angeles Law School opened in 1897, according to the *Announcement of the Los Angeles Law School for the Year 1900–1901*, *in* BULLETINS, *supra*, but the document doesn't define "opened" and is thus subject to the same interpretive difficulties mentioned in the text.

The next document included in *Bulletins* is designated University of Southern California, *Annual Announcement of Department of Law, 1904–05* (June 1904), *in* BULLETINS, *supra*. Presumably at some point between 1901 (more or less) and 1904 (or less but not more), the Los Angeles Law School became known as the Department of Law of USC and (possibly) lost its full independence (if not its separate identity). As mentioned in the text, it is not clear whether this is a mere change of name or signals the end of one entity and the beginning of another. The theoretical significance of this for centennial-marking purposes is obvious. Its practical importance is nil, or is at least unknown to me. I do not address the often spurious theoretical gap between theory and practice because it is theoretically impractical to do so here.

The next document is University of Southern California, *Annual Announcement of College of Law, 1905–06* (June 1905), *in* BULLETINS, *supra*. Here, of course, there is an obvious variation of the more general ontological problem of tracing the origins of how many and which entities; the problem is mentioned for the third time in order to emphasize its unimportance. June 2004, then, could be the centennial of the true USC Law School, for the announcement marked the School's status not only as a part of USC but as more than a Department—it became a College. Perhaps this was a counter-revolutionary move by the principals to regain some of the autonomy compromised when the Los Angeles Law School was lost in the belly of USC. On the other hand, this may have been a modestly transformative alteration of a continuing, numerically identical entity. On any view, however, continuing centennial celebrations could easily be justified for several more years. This alarming prospect seems to be receding, however.

Apparently, USC Law was interdisciplinary from the beginning, or else suffered from a want of legal materials. For example, the curriculum detailed in University of Southern California, *Annual Announcement of College of Law, 1909–10*, at 17 (May 1909), *in* BULLETINS, *supra*, details a course in American Common Law (taught by George H. Smith) that included as readings Herbert Spencer's *Social Statics* (the very same work maligned by Justice Oliver Wendell Holmes, Jr., dissenting in *Lochner v. New York*, 198 U.S. 45, 75–76 (1905)), as well as works by Kant, Hobbes, and the first Austin.

What I most appreciate about these early publications is the tableaux of names, which indicates changing fashions in bestowing designations on newborns. In those days, we find (all are first names for males who are Trustees, Faculty, or Students) the names "Enoch," "Gavin," "Wesley," "Alva," "Clair," "Kemper," "Percy," "Willoughby," "Horace," "Chauncey," and "Norris." Among the women students, we find "Sarah" and "Elizabeth," suggesting, though this is a very small sample, a maldistribution of interesting names favoring males over females. Of course, there were plenty of ordinary male names, so I do not press the gender equality point too far. But, this is more of antiquarian interest than true historical/political insight.

The problem with this and any other anniversary is that it is thought to justify frivolous celebratory actions.

II. MORE SUBSTANTIVE OCCASIONS FOR CELEBRATION, AS ILLUSTRATED BY THE DEAN SEARCH

Three of my excellent colleagues either volunteered or were coerced into holding themselves out as candidates for Dean of the Law School to succeed the esteemed Scott H. Bice, who has now gone sailing and eventually will return to writing really long letters to other legal academics. These letters are semi-officially known as Law Review Articles.

The Dean candidates soon encountered an oft-put question, inspired by the dark fact that whoever is appointed Dean will have to spend lots of time trying to raise money. Why would people give money to an academic enterprise? Leaving aside matters such as a sense of satisfaction for doing good, or getting one's name or likeness scratched into a cement battlement, or arranging tax benefits, the truth is that people want to give money to enterprises that are uniquely meritorious.

So, people would ask: "If you want to be Dean, you have to come up with a good story. What's the story? How are we unique, or at least among the select few?"

This only stopped the candidates briefly. After all, they are law professors—able, trained, and encouraged to respond fully and accurately without hesitation to all inquiries. We used to say that we were especially interested in interdisciplinary studies, and if this was not unique, it was at least rare. When we first started advertising this special interest, there were only two or three other law schools in the nation that could make the same claim. We thought these were nice, small numbers and that, in any case, we had done these other schools one better by going beyond the few disciplines they usually dealt with (history, economics, political science, and philosophy). But what have we done lately? We are certainly no longer unique or even rare.

As for how the Dean candidates answered, you can probably figure it out yourself. We can keep saying that we were among the first, which counts for something; that we (still) do it pretty well; and that we have expanded our vision to cover not only economics and philosophy (the scopes of which were themselves expanded), but also history, cognitive psychology, and behavioral and natural science generally, including string theory. In any case, the Dean search helped illuminate the answer to the (somewhat impertinent) question:

III. WHAT, AFTER ALL, DO WE DO HERE?

I haven't attained my present station by simply blowing off social and institutional obligations. I am thus prepared to respond to the most frequent inquiry the centennial has generated: "Just what do you people *do* at the USC Law School, both in general, and as a specialty?"[3] I hear this everywhere, most often at sites within the School itself, propounded by students, puzzled onlookers, and even faculty members.

Why this is of such immense interest both to persons within and without the Law School community is unknown to me. Fine institution that it is, the Law School is not the President's Cabinet or the World Trade Organization. But I try to respond nevertheless.

A. AN ILLUSTRATIVE INSTITUTION: THE POLYMATHIC WORKSHOP

We have a *lot* of workshops. (Of course, so do other law schools, but we were among the first.) Things happen at these events, some too dark to bear mention in a family journal. But these events capture the core of who we are. Here is an account (PG-13) of what happened at one of these magical events and of the escalating consequences. I refer to the account of this workshop as *Orphan.* The names and addresses of human persons and of institutions are fictional, which underprotects the innocent by depriving them of credit and overprotects the guilty by insulating them from blame.

ORPHAN

The Association for Legal Theory
57 Westborn Place
Santa Lucia, CA 98100

8 Mar. 1994

Professor Benjamin O. Risley
School of Law and Jurisprudence
University of South Central Los Angeles
Los Angeles, CA 90089

Dear Professor Risley:

I am very happy to inform you that you have won the Association for Legal Theory Prize for 1994. This Prize is financed by the May Morton

3. Emphasis in original.

Fund, established by Leonard and Estelle Morton in honor of their late daughter, May. The Fund's Prize Board selected you on the basis of the series of articles you published last year in the *National Journal of Legal Theory* (*NJLT*). In the judgment of the Board, the principal thesis of these works is a major contribution to the understanding of both centralized and decentralized collectivities and holds much promise for future illumination. The ALT Prize, the most prestigious award of its kind in this country, is a worthy recognition of your accomplishments.

As you know, the Prize carries with it an award of $10,000, along with an invitation to deliver the Morton Fund Lecture, which is to be followed by an Awards Dinner.

We will be in touch with you shortly concerning the arrangements.

Felicitations.

Very truly yours,

James Herbert Winslow
Executive Director
The May Morton Prize Fund of
The Association for Legal Theory

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11 Mar. 1994

James Herbert Winslow
[etc.]

Dear Mr. Winslow:

I regret the shock this response will generate, but I must decline your award. This isn't because of any lack of regard for the ALT Prize or because of any falsely modest view about the importance of the *NJLT* articles, but because the main thesis of these works isn't original with me. Although I didn't acquire the idea from anyone else, I can't accept a Prize which, from all I understand, is designed to reward creative theoretical work.

Please accept my apologies. I am sure the eventual recipient will be as worthy as the Prize deserves, if one can speak of a Prize deserving anything.

Very truly yours,

Benjamin Risley
Professor of Law and Behavioral Science

14 Mar. 1994

Dear Professor Risley:

I realize that this is (or was) an overused term in some circles, but I find your letter of 11 March mysterious. None of your *NJLT* articles is this impenetrable. Upon receiving your letter I immediately reread them. Among the extremely copious citations and credits to be found in your footnotes[a] and appendices, there is none to indicate any source other than yourself for the main idea that you presented. (Or is it "ideas"—I've never been able to figure out how to count abstractions or ideas. Does an idea include all its deductive consequences or all the ideas it might suggest or be akin to?) Citations to works by others all deal with related but peripheral points. Of course, if, as you say, you did not obtain the idea from anyone else, this was to be expected.

Nevertheless, as a backup, I requested two of my associates, both highly trained in the specific field, to review your *NJLT* articles and check all publications cited in them, including your own prior articles, in order to identify any possible alternative genesis of the linked concepts you formulated. The theory was that you might have been unconsciously influenced by and were not aware of some specific source(s) of inspiration. I then instructed our very skilled library staff, and specifically our Head Librarian, Ms. Vanessa Tortola, to undertake a more general search, using our computerized database, to find out who should be credited with the central claim you make. She turned up only the related materials cited in your *NJLT* articles, plus the recent publications citing those articles. Many of these recent references of course helped to establish the prize-winning character of the *NJLT* pieces in the first place. The new references are multiplying rapidly, which is to be expected of works that are growing in influence. In none of these recent articles, however, has anyone else been credited as either the direct or indirect source of your specific analysis, although everyone is aware of the origins of the direct precursors of your ideas, all of whom are cited in your works.

Bear in mind that scholars and researchers are often the first to complain of lack of credit to themselves or others. The absence of any outcry by others suggests that there exists neither published nor unpublished material containing your primary idea (or ideas).

a. For what purpose is not always clear.

In short, none of the citations to your works and nothing in the literature indicates any outside source for your idea—and this is precisely the result our Prize Board and Ms. Tortola and her staff originally arrived at in searching for a Prize Winner. I hardly need remind you that the Prize Board consists of some of the most eminent legal thinkers of our time, and their clerks and research assistants are among the ablest in the business.

Nevertheless, I am reluctant to disagree *in toto* with the claim of non-authorship made in your letter of 11 March, despite all the evidence inconsistent with it. After all, who knows better than you what you did or did not think of? I therefore would most urgently ask, who, if not you, is to be charged with the idea in question? If it is contained in unpublished materials, may we see them? Is it someone still living? When you advise me of the author's identity, I will immediately forward this information to the Board. They will, of course, keep in mind that the principal application of these insights remains yours.

Respectfully,
[etc.]

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17 Mar. 1994

Dear Mr. Winslow:

I had hoped that my letter of 11 March would be the end of the matter, but I suppose this was unrealistic. Our exchange is simply another example of the adversities of a prize culture in which everything, good and bad, must be attributed to particular sources for reward or punishment. Maybe the radical egalitarians are on to something. They aren't into rewards, or at least they say they aren't. If it weren't for this Prize, I could have lived out my career without this embarrassing disclosure and self-analysis. After all, since I didn't steal the idea from anyone, there's no one to complain about my conduct. Perhaps this seems magical, but it isn't.

As for awarding the Prize to me for "application" of the theory or theories (I have the same counting problem you do, but will refer to "theory" as comprehending singletons and multiples), I can't allow it: the accomplishment is too thin. Anyway, in this case, the very articulation of the theory, with a few well-chosen illustrations for clarity, *is* the application. So far, I've provided no true applications, though I'm working on them.

Let me entreat you to leave the matter at that. Again, I assure you that no one has been robbed of any credit, and I have not bribed, coerced, or offed anyone deserving of such credit (or anyone else, for that matter).

Imploringly,
[etc.]

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20 Mar. 1994

Dear Professor Risley:

Were this simply a private request, I would retire in my puzzlement and leave you be. But this is no private whodunit. I am charged with the responsibility of distributing the most important award of its kind, and already I am besieged with inquiries about the delay in announcing the Prize and setting a date for the Morton Lecture and Awards Dinner. My own pure self-interest adjures me to press on.

I hope you will understand that I find your last letter incomprehensible. Perhaps the deficiency lies in me. Precisely what are you saying? That you stumbled into the Universe of Forms, and, in that sublime residence, you did not have an idea, it had you? (Of course, if you were doing something notable to attract the idea's attention, that too may be worthy of credit.)

Come, come, Professor Risley. Perhaps I should have thought of this before, but it seems you may be playing an elaborate practical joke, implemented by the Devil of an advocacy. Perhaps all things—DNA, galaxies, energy, ideas, personal identity, peanut butter—are ultimately attributable to God, but the similarity of provenance ends at that abstract level. Practical human beings not doing theology or ancient philosophy work below that plane and cannot concern themselves with it. Ideas must be had. Someone must be credited as their creator(s) or discoverer(s). Joint credit is certainly possible. Newton stood on the shoulders of giants, or so he said, and then there was Watson and Crick and (a level or two down) Maurice Wilkins and (the left-out) Rosemary Franklin, and we are still unsure who did what. But God is not to be listed as the Universal Co-Author of every creation. Praise must be awarded for the good works and blame assigned for the bad. Even philosophers and theologians reward and punish each other (mostly the latter, as far as I can tell, but the point remains). We cannot honor or censure the idea itself, and crediting God or the Devil is for organizations other than the ALT. Even those who think

God spoke to Mozart give Mozart due credit. The little brat at least had the necessary receiving and processing apparatus.

Many things make little sense when you push them to their limits, which, of course, we in law generally eschew, but that's the way the world is.

Do you have a preferred date for the Morton Lecture and Dinner?

Fitfully,
[etc.]

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26 Mar. 1994

Dear Mr. Winslow:

Please excuse the delay in responding to your letter of 20 March but I was involved in some difficult negotiations. Moreover, since I obviously have not argued the point with anyone else—and not very rigorously with myself—I find it difficult to respond articulately to your well-crafted arguments.

In any event, I almost enjoyed your last letter, and only wish this were indeed a practical joke. The matter preys on me, and my wife and children keep asking me why I've been so goofy lately. I see that this matter can't be cabined, so I'll have to tell you a (true) story. Please keep it confidential.

Sometime during March of 1989, I attended a workshop in which a preliminary version of a paper was presented by a friend and colleague whom I'll call Professor L. We often hold these sessions to help colleagues perfect their arguments, as well as to learn what is afoot in their (respective) minds. I found the paper quite illuminating—particularly one remarkable observation.

After the seminar was over, I offered my colleague some general commendations and criticisms, and said that this particular observation was especially striking and useful.

Professor L. denied having said any such thing!

I had listened attentively during the seminar, making careful notes, and I checked them in detail. They recorded precisely the point in question. So I asked Professor L. to repeat those remarks. They concerned a related but nevertheless quite different matter, which was also in my notes. The author agreed that the idea I had identified was indeed a fine

one and deserved further development, but continued emphatically to deny responsibility for it—even indirect responsibility, because the idea was certainly not a deductive consequence of what *had* been said. It was merely suggested, and rather obliquely at that.

I still wasn't fully convinced that I had misheard anything during the seminar. I thought the author might have been confused by the pressure of an intense afternoon of cross-examination by distinguished colleagues in the field, many of whom enjoy sharp debate and insults of the sort that touch one without doing real damage, except to the unduly vulnerable.

Playing detective is not my strong suit, but while the seminar was fresh in everyone's minds, I sidled up to several attendees and asked them what they thought of L.'s idea, which I again recounted. My sense of unease was greatly compounded when they all denied hearing the idea from the author—or from any other source, for that matter. (They too thought it was a keen idea, though.) By the end of the afternoon, I had asked absolutely everyone in attendance and the same result held in every case. Regrettably, no one had taped the seminar; our local traditions strongly counsel otherwise.

Now, I think there is a moral obligation to contribute to the sum of human knowledge and insight, if one can. Not that everyone has to be a researcher or scholar. I simply mean that everyone must support, within suitable limits, the expansion of learning, and that those who are capable and trained should themselves undertake the expansion. (I leave aside whether and to what extent this obligation may be enforced and by whom. Perfectionism in nearly any form is dangerous.) I therefore approached the author once again and said the idea should be developed. We concluded, after careful discussion, that neither of us had really had the idea. L. simply never said or thought what I thought had been said. There is no sense of ownership or authorship of the idea on L.'s part—there is instead a sense of enlightenment from an outside source. Precisely the same is true for me; my subjective sense of authorship is equally nonexistent. My colleague is quite adamant about refusing any credit whatsoever for the idea, even as an accidental causal element. L. is a proud person and feels it would be humiliating to be viewed as a mindless cog, a mere accidental presence worthy of no credit in the creation of an idea.

For this reason, and also because the idea, good as it is, is of limited professional interest to L., collaboration was unacceptable. As for me, obviously I didn't mind being a mere cog in the development of both abstract knowledge and technic. Publications look good on one's Annual

Activities Report, which we snbmit to our Dean, and I also don't mind merit raises.

So, as you now must see, I can't take credit for the idea. I have no sense of having created it. I didn't infer it from what was said; I didn't synthesize it from what I heard taken together with other notions; I didn't create it by active pondering or ratiocination. It didn't come to me from myself. Its source seems external. My sense is that I simply heard it—that it was *told* to me. For better or worse, no one can properly take credit for this true orphan.

Of course, I'm not claiming there was a mysterious event, something not rationally explainable. I doubt that the great God or any lesser gods or anyone else of that sort spoke to me. I don't think there was a miracle. I don't think some living, floating idea became irresistibly attracted to me and embraced my soul. Nor do I think I was having an auditory hallucination in the usual sense of the term. In an important sense, I simply *misunderstood* what L. had said: My so-called accomplishment was the result of a cognitive error! I think the episode is somehow attributable to the way human wiring sometimes works. Human beings are plastic. If our signal-receiving and processing equipment is rewired or reconfigured in certain ways, "messages" will be "received" that were never sent. People will sometimes get spontaneously rewired without knowing it. Something went temporarily awry—not necessarily in a pejorative sense—in my little gray cells. Or, perhaps I was slightly distracted and the signals were misprocessed—which amounts to the same thing. Or, improbably, an atmospheric disturbance upset the sound medium between L. and my ears. Whatever the reason, Professor L.'s signals were not properly decoded. These things happen. After all, there are billions of brain cells in every brain and a whole lot more air molecules around every head. Perhaps something of the sort occasionally happens to hard-wired machines, too.

I hope this explanation makes sense, even though the result seems paradoxical. Cognitive psychology is a bit out of my line—I couldn't even tell you what an idea is (can anyone?)—so my account is pretty clumsy. Nevertheless, the upshot is that no one is entitled to credit for the core ideas presented in the *NJLT*, thongh I am clearly willing to take credit for their felicitous description. After all, I didn't submit my papers to the *NJLT* anonymously. There is nothing wrong with this sort of restatement and re-clarification of ideas. It promotes insight, and, though it isn't worthy of any prizes, it's the foundation of most academic careers.

The bottom line is that I cannot accept further glorification based on a failure to hear or rightly understand what someone else was saying. True, "mistakes" may bring good things—evolution is based partly on genetic transcription errors, and penicillin arose from a happy accident. But an award would be out of line.

This, of course, leaves you with the practical problem of choosing a Prize Winner. I feel somewhat responsible for your predicament. My advice is to give it to Professor Rinaldi for her work on the Second Three Decades following ratification of the U.S. Constitution. While I have several serious objections to the way in which she pursued the matter, it is still much the best work on the subject. Of course, if she's right, all prior accounts of the First Three Decades are seriously wrong. So be it.

To anticipate a possible objection on your part: I can't just let this all hang out because it would compromise the position of Professor L., who, as I said, wants to avoid any association with the ideas in question. This derives from L.'s strong preference not just to give credit where it is due (nowhere, in this case), but to *avoid* it where it is not. If the academic world knew of all this, everyone would start asking who "the originator" is, and L. would soon be tracked down.

I hope the matter will go no further. This is certainly what both L. and I wish. Perhaps you can simply tell the Board that I am one of those odd few who believe the idea of merit is incoherent, that no one is responsible for his or her attributes, whether of intelligence or stupidity or diligence or whatever, and that the utilitarian justification for the myths of pride and prize, of shame and sanction, does not require that every good thing have a human author nor that every single "deserving" party be rewarded.

Perhaps I was negligent in even signing the articles. Knowing the worth of the ideas they explicated, I should have anticipated the degree of recognition they brought. Still, I surely hope this is the end of it.

Wearily,
[etc.]

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29 Mar. 1994

Dear Professor Risley:

I believe that I now fully understand your quandary. But I also believe that you have overlooked an important consideration.

It is clear that as between you and Professor L., the latter is wholly excluded from credit, except perhaps for being near enough the idea to move the current in your "wires" in a certain way. It is equally clear that your system—body and mind together—produced the idea in question. Not *ex nihilo*, to be sure. Who thinks things up from absolutely nothing? (Perhaps a fetal Mozart?) We cannot think unless content is poured into our minds. I don't think Chomsky would deny this, but even if he did, facts are facts. Everyone owes other persons and other things—the Universe itself, and the tiny dense point from which it exploded. There are no human uncaused causers. We all stand on the shoulders of others.[b] All you have told me is that you have no sense that your conscious mind produced the idea. But so what? Suppose you awoke in the middle of the night, seized by an idea that lit up a dream—and who crafted the dream if not *your* very own unconscious *self*. No one else's self produced the idea—it is *localized* to yon. Don't we indeed speak of being "seized" by ideas? You yourself spoke of an idea embracing you, and I said something similar in jest.[c] Perhaps these aren't metaphors but a form of reality itself.

But one doesn't have to rely on dreams; the reference is merely illustrative. Dreaming or waking—it's all just "having an idea"—though it is admittedly colorful to invert the description. What or who is receiving or devising what? How much control do we have over what our minds give us, even when we are conscious? When one is conscious, ideas come

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b. Isaac Newton is said to have said this, but I don't know if it's original with him, and will not research the point.

c. John Gardner writes:

> [S]ome writers—not the least of them Homer—. . . [speak] without apology of Muses as, in some sense, actual beings, and of "epic song" and "memory" (not quite in our sense) as forces greater than and separate from the poet. We often hear even modern writers speak of their work as somehow outside their control, informed by a spirit that, when they read their writing later, they cannot identify as having come from themselves.

JOHN GARDNER, THE ART OF FICTION 51 (1983).

And in his review of a biography of Robert Louis Stevenson by Frank McLynn, James Bowman states:

> Mr. [Frank] McLynn goes so far as to say that Stevenson was unique among writers in deriving his inspiration directly from his dreams. Stevenson spoke of the unconscious source of his books as "My brownies, God bless them! who do half my work for me while I am fast asleep, and in all human likelihood, do the rest for me as well, when I am wide awake and fondly suppose I do it myself."

James Bowman, *Bookshelf: Out of His Oedipal Nightmares, Boys' Books*, WALL ST. J., Jan. 3, 1995, at 7 (reviewing FRANK MCLYNN, ROBERT LOUIS STEVENSON: A BIOGRAPHY (1993)).

Finally, note David Gates stating:

> Then, in October 1987, . . . Dylan had his breakthrough. It was an outdoor show—he remembers the fog and the wind—and as he stepped to the mike, a line came into his head. "It's almost like I heard it as a voice. It wasn't like it was even me thinking it. *I'm determined to stand, whether God will deliver me or not.* And all of a sudden everything just exploded. It exploded *every* which way."

David Gates, *Dylan Revisited*, NEWSWEEK, Oct. 6, 1997, at 62, 66.

unbidden all the time—we don't necessarily call them up on demand, although in some sense this does happen—and who knows what the causes are? In a way, persons with thought disorders and obsessions illustrate this vividly. Is there some hidden, possibly deranged "I" sending messages to you? Does he, she, or it in turn bid his, her, or its own ideas? You yourself would probably say we should get credit for our own unbidden ideas. You would, after all, have accepted the Prize if you had had the *NJLT* idea in the ordinary way—whether while awake or asleep.

I suppose you could say that one ought to receive credit only for bidden ideas—but why do they deserve any more credit? You didn't assemble the equipment that responded to—and indeed formulated—the request. And even if you had, on your very own view, why should you get credit for what some ungovernable, unknown aspect of you delivers to you? Why should you even get credit for your redaction of an insight not your own? To say "because it is from me in some sense" would simply restate the issue—and rather in my favor in our little dispute.

As you must see, I am not arguing your side; I have drifted into doing a *reductio ad absurdum.* If we follow your lead, no one is entitled to credit for anything. We can't have that, can we? Of course not—not any more than we can deny the emotional impact of the idea of free will, despite its intellectual intractability. I said as much in my last letter. If a poet is inspired to write a masterpiece on the weather after hearing the rustling of the leaves, is he to avoid or attenuate credit by assigning it to the wind, or the leaves, or the tree? If the words flow into his mind, it is *his* mind into which they flow and from which they emanate. Even if you view your mind as a "mere" conduit, it was your mind, your conduit, and no one else's, that we know of, that transformed the incoming data from L.'s seminar into the contributions appearing in the *NJLT.* Your person was set up, as it were, for the idea waiting to happen: *You* were wired up for it. It was *your* idea, in the sense that your system was a— no, *the*—major causal element in its production. It was your idea even though you didn't think it was. Even lawyers specializing in intellectual property would agree, I'd bet. Indeed, they would be the first to point out that Newton, Einstein, Freud, Picasso, Beethoven, T.S. Eliot, and all our other gods and avatars had their precursors, whether persons, apples, or peaches.

Very well. I have now done this idea to death; forgive the repetitions—I was trying to convince myself as well as you. And indeed, Professor Risley, instead of persuading me that you do not deserve the Prize, you have done precisely the opposite. I do not care whether it is your conscious mind or your unconscious mind or some supernumerary

personality of yours that is primarily responsible. We are all "a multitude," as Mr. Whitman put it. What is clear is that you—whatever complex whole "you" may designate—are indeed responsible. You, or your aggregated multitude, are as responsible as if you had dreamed the idea. There I go again, re-convincing myself. Sorry.

We will be in touch shortly about the Lecture and Dinner. In the meantime, I must advise an impatient Board.

With renewed hope,
[etc.]

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1 Apr. 1994

Dear Mr. Winslow:

Perhaps I didn't give enough thought to responsibility for one's unconscious. Although I'm not too clear on just what unconsciousness means (or what consciousness means, for that matter), there's a lot to what you say—though it can be carried very far. Are people to be punished if they cause harms during a fit of unconsciousness they could not predict, assuming such things happen at all? After all, *they* did it, on your view. *Reductios* can sometimes go both ways. This is what paradoxes and dilemmas are all about.

In any event, your analysis is incomplete. I concede that I bear some causal responsibility for "my idea." But it's not necessarily "my system" that "produced" the ideas, and even if it were, to be a cause is not necessarily to be responsible for purposes of either blame or praise. If I punch an innocent person and hurt my fist, my victim is part of the cause of my injury, but he isn't morally responsible for it. You're melding the causal and moral senses of "responsible." Suppose a local atmospheric anomaly between Professor L.'s head and mine altered the way the message energy was transmitted? If a high wind alters the words written by sky-writers, who takes credit for the new "message," if there is one? If I'm dyslexic, or some such thing, and read a message in a strange way that charms the world, am I to accept praise for it? Well, perhaps dyslexia and schizophrenia and other things can be part of someone the way regular aptitudes are. Perhaps they are just funny abilities.

But I'm still unconvinced that my mind should take credit for the ideas just because it was an unwitting accomplice to their creation. The *reductio* has to be to an *absurdum*, and I don't see the absurdity of denying my responsibility or desert in this case. The situation is simply different,

and surely *feels* different, even from dreamworks. There is nothing wrong with saying no one is responsible for a particular idea. It violates no laws of nature or logic; there is no principle announcing abhorrence of credit or responsibility vacuums. (Remember those neat causation puzzles in criminal law? Good old Hart and Honoré.) As far as I am concerned, the idea in question just passed through me on its way here and there.[d] I suppose there are better and worse thoroughfares and I could have garbled the message, but not doing so is hardly worth a prize. I was a mere scrivener! Repairing or putting the finishing touches on someone else's work of art merits only modest acknowledgment. The same is true of doing so with an authorless idea.

I can't, at the moment, think what else to say, and there is still the matter of the Prize, a practical matter that overwhelms all. So I accede to your arguments and accept the award.

Reluctantly,
[etc.]

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4 Apr. 1994

Dear Professor Risley:

I have written this in haste and sent it express mail because of an untoward event that I should have anticipated. The Board is now balking at giving you the Prize. I had originally told them that you were reluctant to accept it because you did not believe in prizes, but one of the Board members pointed out that you had recently accepted an endowed chair. I tried to explain the distinction between that and accepting a prize, but had little luck and am not fully persuaded on the point myself.

I thus had some further explaining to do, for which I apologize to you and to Professor L., but I believed it necessary. I trust it will not compromise matters too seriously. I told them that you thought you heard someone say something similar to your *NJLT* thesis, but that when approached, the party flatly denied saying it, and that you are reluctant to accept credit for an idea that was simply in the air, so to speak. (I should

d. Perhaps you saw the article in the *Wall Street Journal* about the artist who lost much of her left-brain function because of a stroke. "'Sometimes I look at my work now and ask, "Did I paint that?"' she says. 'There's a sense of disconnect that was never there before. It's almost as if the ideas just pass through me, instead of originating in my head.'" Her name is Katherine Sherwood. Peter Waldman, *Master Stroke: A Tragedy Transforms a Right-Handed Artist into a Lefty and a Star*, WALL ST. J., May 12, 2000, at A1.

tell you that Ms. Tortola, the Head Librarian of whom I spoke, found this account to be exceptionally amusing.) I hope Professor L. is not unduly vexed by this. In any event, you may very well get your wish to escape the Prize, over my continuing objection.

Faithfully,
[etc.]

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5 Apr. 1994

Dear Professor Risley:

I again write by express mail to tell you of a promising development. In a private conversation, our Head Librarian, Ms. Tortola, offered a solution to our quandary (though for me it is no quandary, as I said, except in a procedural sense). I was quite taken with it, though this may be due partly to her persuasiveness. She proposed a Non-Prize ceremony in which you and Professor L. would jointly share a lack of credit. The seminar episode could be recounted by you, with backup by Professor L., who could discuss the paper that began all this. We could invite a philosopher and have a panel discussion not only on our orphan idea and on L.'s ideas, but on the ideas of merit and desert and the degree to which anyone is responsible in morals or law for his or her successes or failures. We could, in particular, invite an intellectual property specialist with experience in screenwriting credits and coauthorship generally, software ownership, copyright and patent law, and so on. (The ranks of intellectual property specialists have increased with every advance in computer science and programming, molecular biology, and the Human Genome Project in particular.) The presentations might stimulate some scholarship in legal and moral theory and related topics. The $10,000 in Prize money would be retained by ALT as part of the investment fund for future awards. We would of course still pay all reasonable expenses and an honorarium in the high three digits for both of you, and a lesser sum for the commentators and disputants. The obvious virtue of this maneuver is that it leaves it to the world at large to decide upon credit and blame. It completely avoids Professor L.'s fear of false credit, though it risks some of the embarrassment your colleague fears, and it leaves anyone free to give you full credit for the ideas. Indeed, I think that is what would have happened if you had at the start explained in the *NJLT* articles the discovery of your foundling. (Or is it a changeling? They aren't all evil, you know.) The only difference is that you would have gotten sole possession of a Prize instead of sharing a Non-Prize.

Please contact Professor L. as soon as possible and communicate our proposal.

Anxiously,
[etc.]

PS: Something else just occurred to me and I don't want to bother redoing this whole letter just for aesthetic purposes. The idea of decentralized collectivities that you emitted (Is that neutral enough for you? Perhaps "brought forth" is better) cuts across practically everything. No, that doesn't evacuate the meaning; it's just a take on one aspect of the structure of the Universe. It covers the molecules in a gas container; the drifts of genes; the movements of a flock of birds, bat maneuvers, beehives and ant colonies; the supposedly disparate units in a federal system—how can you be a loyal citizen of a state and also of a more inclusive something when everyone is at everyone else's throats?; species at war with their respective genera and with each other; maybe even the development of language and the march of history—the complex "aggregation" of supposedly individual private acts (as with evolution, which I remarked on earlier); and the relationship between "different cultures" embedded within a "larger culture." Perhaps some notions of God are about decentralized collectivities. There is an infinity of ways of looking at these illustrations—and in some cases, skillful lawmaking and interpretation involves looking at as many of these ways as possible within the given time frame before declaring that satisficing is complete. Of course, the philosophers can get heavily in on this—in fact, they were here way before we were. Some of them may object to any given way of describing what we are talking about. After all, if what we see is "decentralized" or "noncentralized," what do we assume even when we call it a "collectivity" as opposed to just a bunch of things we happen to encounter or that encounter each other while they are hanging around the neighborhood?

Think also of the idea we both mentioned some days ago of what constitutes a single object—what is the whole; what is the part; what should we lump (which "pieces" or atoms or subunits should be lumped—but we can't even say *sub*unit without begging questions, right?); what should we split (parallel comment); whether a name embraces particular aspects or subunits or an entirety; what is "of us" and to be welcomed; what is "other" and to be shunned; and what one should think and say and do about absorption? accommodation? integration? assimilation? of different cultural? ethnic? racial? national? class? groups within larger groupings? Think of the irremediable tension between being independent/autonomous and being part of a greater linked whole. Given certain facts

about the world, the tension is a matter of logical connection—the two arms of the tension are no more severable than the sides of a plane. Nothing escapes the reach of this self/other distinction—including the question whether it's a meaningful distinction at all. So we are driven to the familiar self-refereutial puzzles.

Perhaps we've heard all this before, but not in this way. You don't hear the federal union analogized to a flock of birds or to the concept of inclusive fitness in evolutiou or to a garden every day.[e]

Your body of work pointedly shows the power of abstract thought to illuminate distinct but isomorphic fields. Evolution works. Flocks of birds work—they are both a collective and a set of individuals, depending on the circumstances. So is a federal union. I anticipate the time when new federalism cases will refer to the birds and bees in a conceptual/ normative/constitutional law sense. That's why you were able to say in your articles that rational thinking is all of a piece; there are no fully independent spheres—our thoughts are fused toward the top: It's a unified field—science, ethics, law, ornithology, entomology, the study of bats, whatever. Thinking like a lawyer is simply a variation of rational thought under the circumstances. (But the phrase "under the circumstances" suggests a splitting. How do we characterize the differences between the different branches of equally rational thought?)

You might think this is all too "reductive." But this proves too much: All characterizations are reductive—yet characterizations are indispensable. However we characterize these characterizations, think of the immense assortment of scholars, lawyers, scientists, and wonks-of-this-or-that we can invite. It's a great opportunity for merging disciplines—multidisciplinariness is itself subject to the adventures of part/whole decentralized collectivity analysis. Are merged disciplines a kind of federal union—a collectivity, centralized or not? For that matter, is your own work the working out of a single idea and the sorting of its inferential consequences or its multiple aspects, or are we dealing with a set of ideas—connected by yet another idea of uncertain numerosity? What is One and what is Plural? When do neighboring (maybe not even neighboring—think of quantum spooky action at a distance) cells become a multicellular body and then a single entity?

e. You've probably already seen David G. Post & David R. Johnson, *"Chaos Prevailing on Every Continent": Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1059, 1064–74, 1083–91 (1998) (discussing federalism, the Gardener's Dilemma, and dividing "complex systems" into "patches").

Well, I'd better get off this flight of ideas now. I'm sounding somewhat theological. Hey—another discipline! We can invite some of them too. I suppose anyone in any field at all is an eligible prospect. What's a field, anyway?

Wait—the Internet—cyberspace. This will just keep going until the last proton decays.

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8 Apr. 1994

Dear Mr. Winslow:

Professor L. refuses to appear at the Non-Prize ceremony but says that since the cat is already almost fully out of the bag, you might as well go ahead with it. The situation remains regrettable because my colleague is rather demoralized by all this, believing that identification and stigmatization as a "loser" is inevitable. I suppose it makes me look like one too, but I'm not that sensitive. Unfortunately, my relationship with L. is somewhat jeopardized now that this has all come out. Because it is understood not to be entirely my fault, however, we are still on reasonably good terms.

For my own part, I will be happy to participate in the Non-Prize Ceremony, a term that now deserves initial caps. I will try to repair things a bit by giving L.'s work a strong plug. It's very good stuff, and is worth Prize consideration on its own—or will be when the corpus is extended somewhat.

Your suggestion that I should have ventilated all this in the *NJLT* seems, in retrospect, well taken. Perhaps I just didn't want to attenuate my accomplishment, such as it was, though I really wasn't seriously thinking about rewards.

I appreciate your discussion of the scope of my writings. Not quite a theory of everything, but just wait.

Gloomily,
[etc.]

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11 Apr. 1994

Dear Professor Risley:

I hope you are continuing your negotiations with Professor L. Ms. Tortola has been scanning lists for appropriate persons to discuss the

scientific, philosophical, and legal issues. She recommended that the format be a summary of L.'s original paper, then an account of the extra-corporeal birth of the *NJLT* non-prize-winning theory (she suggested that this be acted out by the original protagonists, but we won't insist on that), followed by the discussions of the theoretical implications of your work and L.'s work, and finally the exotic matters of philosophy and law we have addressed in this correspondence. (How come we never used the telephone or other devices? Technophobia, perhaps.) She also recommended that we notify the press, which may be interested in this pleasantly bizarre academic adventure. Perhaps we'll all be famous. Briefly.

Very hopefully,
[etc.]

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14 Apr. 1994

Dear Mr. Winslow:

Done. L. finally agreed to the idea and may even participate in the Ceremony, but complained about having to refurbish the paper that started all this, which has been untouched all this time. Other matters took priority. Evidently the opportunity to present it and the stimulus to work on it again partly compensates for the unwanted revelation. In fact, L. says that the paper now appears in a new light, with far greater promise. Letting ideas sit for awhile has its merits. They certainly are volatile entities.

My compliments to Ms. Tortola. She seems to be a valuable resource. Perhaps there's some way her contribution can be recognized.

See you soon.

Thankfully,
[etc.]

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17 Apr. 1994

Dear Professor Risley:

I am happy the matter is now all but settled. We have already distributed a press release and received numerous inquiries from the media and the public. Ms. Tortola is handling it all, at my request, and indeed has been interviewed on local television to explain what is happening—an unusual circumstance for librarians. She is quite popular with the press

because of her articulate and engaging personality, not to mention her evident abilities. Many viewers have urged the TV stations to retain her for various televised functions. I'm glad she's receiving all this attention, but fear that hereafter life with ALT may be too pale for her. I have been trying to remedy that in my own way, but my efforts could be counterproductive.

Incidentally, when I told her that you hoped she could be recognized for her contributions, she said most of the ideas came to her while she was metabolizing certain substances. She believes this was a causal factor and so disclaims credit. Will no one own up to their accomplishments any more?

With the greatest relief,
[etc.]

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20 Apr. 1994

Dear Mr. Winslow:

No one is more relieved than I that success is at hand. Even Professor L. seems to be in a good mood, though it's hard to tell with someone who has the personality of a prune.

Good luck to you and Ms. Tortola.

Finally,
[etc.]

So, this is some of what we do here. If you'd like to give a workshop, let us know, but bear in mind that anything can happen. The rest of this article is completely severable from the first part, but since the first part suggests it and I'm on the job at the moment, I go on, with or without the readers' company.[4]

4. The discussion in the text parallels remarks in BIOETHICS AND LAW (Michael H. Shapiro, Roy G. Spece, Jr., Rebecca Dresser & Ellen Wright Clayton eds., 2d ed.) (forthcoming sooner or later).

IV. THE MULTIPLE SENSES OF "LAW AND *X*": DOING LAW THAT INVOLVES DEALING WITH SPECIALIZED KNOWLEDGE; DESCRIBING AND EXPLAINING LAW; AND EVALUATING LAW.[5]

A. IN GENERAL: THE MEANINGS OF "AND"

Some readers may have noticed that although law is mentioned in my account of the adventures of the orphan idea, no extensive legal argument structures are presented, examined, or evaluated. Some may thus view the story as an effort to show how "interdisciplimary" (ID) or "multidisciplinary" (are these the same?) our work is, because such efforts often do not display themselves as legal arguments or analyses. Their theory is that "ID" is a code word for: "There's no law stuff here. We just have some philosophers, economists, historians, psychologists, and others, who didn't want to practice law but were unhappy with the pay scales outside of professional schools, and so decided to pursue their true calling in a law school." Who would know the difference? Surely, one can argue, the ID movement wasn't inspired by some awesome insight into the nature of law, economics, philosophy, and so on. What would that insight have been? It was simply a rational move toward income or wealth maximization.

Whatever its genesis, as I said, USC Law was in on ID almost from the start. All our Dean candidates dealt with it, whether on their own or whether forced by their auditors into confronting it. We have long been concerned because we have been stymied by our own success: Everyone does it now (how much of this is attributable to us I leave aside), not just the illuminated few. Is there anything that remains even semi-unique about us? What do we (still) do better than most others, if anything? What *is* this obsession with enveloping just plain law within layers of . . . whatever?

Although as a non-Dean I don't often have to come up with wealth-attracting accounts of the Law School, some brief comments on what "ID" means are now in order. One would think it had been fully explained by this time, but full explanations are hard to come by in our fields of conceptual analysis.

The exchange of letters presented above might be taken to exemplify "law and philosophy," or "law and the paranormal," and so on. To a limited extent, I am willing to go along with these locutions relating law and something else, but it's somewhat misleading to talk this way. The

5. This reflects the rough and oversimplified distinction between doing law and explaining it.

particular problem I address here is not directly about whatever flanks the "and" in "Law and *X*"—it is with the "and" itself. There is no grave conceptual problem in understanding "bacon and eggs," but "Law and *X*" is another matter.[6]

"And" does radically different kinds of work in different contexts. The expression $y = x^2$ is an algebraic equation that can easily be depicted geometrically in a rectangular coordinate system. Given certain laws of physics, the curve thus depicted describes various things (depending on the exact form of the equation), such as, say, the path of a ballistic missile in free fall. One thus can see here an illustration of "algebra and geometry and physics." We can say loosely that $y = x^2$ and the curve and the path of the missile are "all the same thing," looked at in different ways. The "same thing" obviously has different aspects and descriptions; recall Claude Monet's famous series, *Cathedral at Rouen*, made even more famous by Professors Calabresi and Melamed[7] ("law and art," in one sense of "and") or the "Thirteen Ways of Looking at a Blackbird" mentioned by Wallace Stevens.[8]

Think also of the difference between a chemical compound and a mixture of substances (at least as illustrated in the simple context of Chemistry 1A). In the former, the previously separate chemical constituents no longer present all the properties they had when freestanding: A substance with a distinctive chemical identity is in place. Whatever the comparative properties of the compound and of the mixture, the "and" in "this stuff is made up of *p* and *q*" does different work when applied to the one rather than the other. I stop the illustrations here and offer no unifying combinatorial theory; to pursue this rigorously would require extended philosophical inquiry and the progressive incoherence this entails.

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6. *See* Arthur Allen Leff, *Law and*, 87 YALE L.J. 989 (1978) [hereinafter Leff, *Law and*] (discussing formulas of the form Law and *X*). Despite its title, Arthur Allen Leff, *Law and Technology: On Shoring Up a Void*, 8 OTTAWA L. REV. 536 (1976), is not directly about law and technology in any of the senses specified here. It is an attempt to establish the utter arbitrarincss of moral theory, so I am not going to cite it. The "separation" referred to in Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805 (2000), is not directly concerned with the distinction mentioned here, but may illuminate it. *Cf.* Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249, 250 (1999) (discussing "whether human rights are truly universal or whether they are culturally dependent").

7. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 n.2 (1972).

8. If this were a regular law review article, which it isn't, I would have to identify a work of Stevens' that contains this poem.

So, were the workshop and its consequences an illustration of law and philosophy, or law and psychology, or law and magic? To me, it's all doing law in an expansive sense. But *x* in the expression "Law and *X*" often means something different within that expression from what it means when it is freestanding—i.e., "on its own." (To be sure, "*X* is now being considered on its own" can't be adequately interpreted without an account of "we are now considering Law *and X*"—and vice versa. There is a nontrivial risk of circularity here.)

B. DOING LAW

Consider an example of "law and philosophy." In *Thor v. Superior Court*, the California Supreme Court, in ruling that a disabled prisoner had a right to refuse lifesaving care—including administration of nutrition and medication via surgically inserted feeding tubes—commented on the moral concept of autonomy, citing various works in the bioethics literature.[9] (The sources of law seem to be the common law, the U.S. Constitution, and possibly the state constitution, but the derivation is unclear.) Why? To what end? Perhaps in some delusional transport, the court found itself back in Philosophy 101. The court, of course, *had* to comment on the prisoner's essential claim: He wanted to do or avoid something, but he was prevented from realizing his preference. By hypothesis, he had a plausible argument that his autonomy or liberty was compromised. What is the legal status of that claim? Constitutional doctrine adjures us to examine "tradition" (at least among other things, depending on one's interpretative criteria) in determining whether a claim of right concerns matters out of bounds for government control, absent compelling or important reasons for such intervention. What sort of investigation is this? Perhaps it is an empirical inquiry into prevailing social behaviors, beliefs, and attitudes. If so, *doing (constitutional) law* here *entails* doing history/anthropology of a sort.

Moreover, the judge-as-historian has to identify the question for historical investigation, and this may require extensive conceptual analysis. Is the judge to vet traditional community views about "autonomy"? Is this too broad? Autonomy with respect to health care decisions? Maybe. Autonomy with respect to lifesaving care? Probably closer to the mark. Autonomy with respect to lifesaving care when one is imprisoned following criminal conviction? That would seem to be pretty much on the

9. 855 P.2d 375, 386 (Cal. 1993). The court indicated that its holding fell short of a "sweeping declaration" that "'a mentally competent [person] has a virtually unqualified right to refuse unwanted medical treatment.'" *Id.* at 386 (quoting Brief of Amicus Curiae California Medical Association).

money—although the California court didn't formulate the question this way, and its account of the state's penal interests was quite thin.

The point, in any event, is that one must use philosophical/conceptual skills in formulating the questions, and this task doesn't seem purely empirical. To complicate matters still further, the choice of how to describe what the court is hunting for has obvious moral dimensions—a point illustrated by the very fact that multiple descriptions of the holding compete for places of honor in the court's decision.[10]

So, if one wants to say that *Thor* illustrates law and history or law and philosophy, OK, but it seems far more accurate and illuminating to take it as an example of how historians and philosophers can help the court *do law*: By hypothesis, the court must assimilate some of what they have to offer, given the court's interpretational stance. As mentioned, the court in *Thor* in fact cited some standard sources in bioethics and other areas when it announced that:

> Given the well- and long-established legal and philosophical underpinnings of the principle of self-determination, as well as the broad consensus that it fully embraces all aspects of medical decisionmaking by the competent adult, we conclude as a general proposition that a physician has no duty to treat an individual who declines medical intervention after "reasonable disclosure of the available choices with respect to proposed therapy [including nontreatment] and of the dangers inherently and potentially involved in each." The competent adult patient's "informed refusal" supersedes and discharges the obligation to render further treatment.[11]

The court's comment seems to be an empirical conclusion (*very* loosely derived) about community moral values and about how the community thinks these values should be implemented in public policy. That "finding" is then used—under such a state policy rubric—to inform the process of interpreting (applying?) the state's common law, its constitution, and its statutes. (Perhaps these varying sources of law involve different interpretive processes.) Recall once again that certain interpretive techniques in constitutional law expressly incorporate mixed empirical-

10. See generally *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), for an explicit debate (carried on largely by Justices Scalia and Brennan) on how to formulate the particular "tradition" hypothesis to be (dis)confirmed. For extended analysis, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Timothy L. Raschke Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992).

11. *Thor*, 855 P.2d at 383 (quoting Cobbs v. Grant, 502 P.2d 1, 10 (Cal. 1972)) (alteration in original).

like[12] and evaluative claims about tradition and evolving standards. This is one way (and according to some, the only right way) for the U.S. Supreme Court (or any American court) to find important but nonexplicit liberty interests under the Fifth and Fourteenth Amendments, or to interpret explicitly protected interests such as First Amendment rights, or to determine what punishments are "cruel and unusual." A plausible question for future reference is whether the court should have been more rigorous in its empirical quest for tradition.[13]

But this passage from *Thor* might also be viewed as an independent moral pronouncement by the court. The empirical claim about consensus follows what might be taken as a moral characterization of the status of autonomy, separated from it by the phrase "as well as." ("Given the well- and long-established legal and philosophical underpinnings of the principle of self-determination, *as well as* the broad consensus that it fully embraces all aspects of medical decisionmaking by the competent adult . . . .")[14]

So what exactly went on in this case? Perhaps there is no exact fact of the matter about what the court did. In any event, however one interprets the court's interpretation of the legal texts under review, sooner or later one asks about the source of moral insight expressed in a premise of a legal argument—whether the court's insight, the community's, or anyone's—and what that insight rests on. This is as central a jurisprudential issue as one can find. The point is that, whatever went on, the court was doing law in examining moral and historical accounts of autonomy. Some may deny it's doing law at all, as opposed to exercising naked power, but if a given court is doing the latter, it is not necessarily by virtue of doing what the *Thor* court did.

But doing law is one thing; doing law well is something else. Whatever the California court did, it should have explained the exact rules under which it was authorized to do what it did, and their sources. It was a bit sloppy here, but well within the customary standard of care within the judicial craft. The court seemed to ground its ruling primarily on the common law. It also cited *Cruzan v. Director, Missouri Department of Health*,[15] but whatever constitutional rights to refuse lifesaving or life-prolonging care that were recognized (or assumed arguendo) there may be

12. Weasel words are called for here. Empirical investigation is necessary for identification of tradition, but it's not sufficient: Choosing what to describe as the tradition in the face of conflicting social practice is not a pure matter of fact.

13. *See* Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

14. *Thor*, 855 P.2d at 383 (emphasis added).

15. 497 U.S. 261 (1990).

too weak to support *Thor*. And it cited with approval *Bouvia v. Superior Court*,[16] where the California Court of Appeal held that a bedridden woman with cerebral palsy had a right to refuse nourishment, and that her providers had a duty to provide comfort care. (Perhaps this was in effect a duty to assist in suicide. The concurring opinion thought so.)[17] *Bouvia* rested in part on article I, section 1 of the California Constitution,[18] but it is unclear whether *Thor* also rested on this source of law, despite its reliance on *Bouvia*.

C. EXPLAINING LAW

As I said, there are different kinds of "law and," with the "and" bearing *quite* different loads in different instances of "law and." The discussion of *Thor* suggested that tracing the varying functions of "and" as a logical connector can illuminate some of the complex interiors of doing law. But "and" often links law with a hypothesis or theory *about* law. Here, the "law and" phrase doesn't present an aspect of doing law; it points to a freestanding discipline meant to explain the processes and outcomes of doing law. (This distinction bears some similarity to that between the "internalist" and "externalist" perspectives of a legal system and its constituents.)[19] One thinks here of claims that courts, consciously or not, in fact seek to promote efficiency (suitably defined), or to vindicate existing normative systems through certain public and private rulings and official explanations. Of course, some account is needed of what it is people seek to explain, but I'm certainly not going to deal with "What is law?"

The most vivid literary example of this form of "law and" is in Arthur Leff's account of two tribes (three, including legal theorists).[20] The tribe of economists is said to offer one explanation of what they observe—but it doesn't come out quite right, as Leff argues. The tribe of (other) social scientists offers a different explanation. It too falls short, and the strong suggestion is that, however the separate models are revised, no complete

16. 225 Cal. Rptr. 297 (Ct. App. 1986).

17. *Id.* at 307.

18. CAL. CONST. art. I, § 1 (protecting privacy).

19. *See* H.L.A. HART, THE CONCEPT OF LAW 88, 89 (2d ed. 1994) (distinguishing "the 'internal' and 'external' aspect of rules," and observing that one may "be concerned with the rules [of conduct], either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view.'").

20. *See generally* Leff, *Law and*, *supra* note 6. *See also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998).

explanation will be possible. Indeed, even modest gains in accuracy will be difficult unless the competing explanations cease competing and arrange a merger, possibly including other explanatory systems.

D. EVALUATING LAW

The distinctions here are familiar, and because this isn't a real law review article, I believe I am free to slop them up even more than usual. One can evaluate law by judging empirically how well it promotes agreed-upon goals. Moral evaluation is required even in this supposedly empirical analysis: "How well" it moves us toward our goals (including cost considerations as part of overall goal analysis) is a normative issue. Recommendations that courts that are engaged in constitutional adjudication should focus more on legislative means and less on legislative goals thus do not avoid the necessity for normative analysis. Obviously, evaluating goals within a legal system requires moral analysis at various stages, so the very criteria for evaluating law involves one in matters going far beyond recognizing and applying authoritative legal texts. "Law and economics" used as a normative tool for evaluating legal systems—say, by positing some form of efficiency as intrinsically or instrumentally valuable—thus reflects "normative economics." In other contexts, it may embody "positive (or descriptive/explanatory) economics."[21]

Of course, there is also "law and" in the sense of "the law of *x*"—as in "law and nursing" or "law and accounting." But this is simply "the law of *x*" and requires no further attention here.

This not an exhaustive account, either of "law and" or of what we do at USC Law but it's sufficiently complex and rambling to require a summary, although it may suffer the same deficiencies despite my efforts.

First, "law and" may loosely signal what *doing law* is in situations requiring certain sorts of information or empirical insight. In such circumstances, the legal process sometimes makes it seem as if the

21. *See generally* Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 548–51 (1980) (discussing positive and normative economics, and economics and adjudication); POSNER, *supra* note 20, at 26–29 (distinguishing the "'economic theory of law'," which "tries to explain as many legal phenomena as possible through the use of economics," from the "'efficiency theory of the common law'," which "hypothesizes a specific economic goal for a limited subset of legal rules, institutions, and so forth.").

protagonists are doing something else. When litigants contest patents or FDA findings, for example, they often *must* make use of scientific data and inferences *to do their law jobs*. Similarly, if what must be determined is "tradition" or community values (which when recognized may form or influence public policy findings—recall *Thor*), there is again a core factual component that requires confirmation. This project may be aided by historians and social scientists, although as always, "factual" conclusions may be laced with matters of value and preference. Thus, in this sphere, the phrase "Law and *X*" simply indicates that the law, as the law, must refer to some body of data, knowledge, or insight.

Second, "Law and *X*" might designate a field of science—legal anthropology of sorts—that "explains" the genesis and operation of law generally and in specific fields. This isn't really "doing law" in the on-the-job, down-and-dirty sense, but law people—practitioners, judges, and most often academics—frequently work in this area, for better or worse. In a sense, it's doing law, but from an "external" viewpoint rather than an internal one.

Third, "Law and *X*" might involve neither doing nor explaining law, but evaluating it. Of course, sometimes all three are intertwined. For example, a court might think that the soundest common law doctrine would include a notion of efficient breach. An economics-oriented legal anthropologist might see this and take it to support the empirical hypothesis that the common law, explicitly/consciously or not, has been crafting rules that promote economic efficiency in some form. And an evaluator—economist, anthropologist or whatever—might say that this is a good thing: This is what the law ought to be doing. Someone else might urge, on the other hand, that this reflects a moral deficiency of the law: It should look more to reinforcing certain social norms, without regard to pure economic efficiency, because it would better promote society's long-term, overall best interests (which itself is a larger, more inclusive notion of "efficiency").

A final note on this centennial event. When asked to write an article for publication, I sometimes ask what subject the invitors have in mind. I received an informal response stating that the "[t]opic is wide open . . . but falling within two camps: reflections on teaching at USC Law (more

common for the 'old-timers') and reflections on the path your particular area of scholarship has taken and perhaps [in the future] is likely to take."[22]

I certainly am not an old-timer. That's for people in their seventies or above, and this threshold is rising with every passing moment. But I can't seriously argue that I am in the other camp. In any case, I've been at the USC Law School for thirty years, including regular, permitted exercise times out-of-doors, so I assign myself to a *tertium quid* status, or, more paradoxically, to both the old- and young-timers domains. It appears, however, that I haven't fulfilled the mandate of this issue, as articulated by Dean Lash.

Too bad. I already have tenure, and my failure is hardly cause for dismissal—at USC Law, at any rate.

In any case, if there are any law schools deserving of celebration for their interdisciplinariness, USC is certainly one of them, as anyone can tell from reading the more substantive contributions to this issue. Things are pretty good here: good faculty, good students, good administrators, good librarians, good collegiality (which is especially impressive considering our range of ideologies, though the monarchists are long gone). So the matter of desert is not in issue, and noting the occasion is not so bad in itself, as long as burdensome social obligations are kept to a minimum. True, some will say that reducing the intensity of celebration defeats the point of marking the event. So be it. Indeed, this may not be an objection to doing so, but a reason for it.

Years ago, a former colleague said (this is close to the mark but not verbatim): "Every morning, I wake up and thank God that I'm at the USC Law School." (You know who you are, turncoat.) Everyone understood what this meant, and this person's subsequent departure had nothing to do with matters concerning the Law School (or so we were told and prefer to believe the person claimed). But why would anyone say such a thing, with or without the religious component? Why do those who leave do so gloomily or with a sense of dread and regret? Why do they return for centennial celebrations?

Largely because this place is (so far) an exception to the general rule that people, groups, and institutions are no damn good.

Thank you for your attention to this matter.

22. E-mail from Karen A. Lash, Associate Dean and Adjunct Associate Professor of Law, University of Southern California Law School, to Michael H. Shapiro, Professor of Law, University of Southern California Law School (Jan. 31, 2000) (on file with author).